

DEC 29 1995

STATE OF MAINE

SUPREME JUDICIAL COURT

DOCKET NO. BAR- 95-6

THE BOARD OF OVERSEERS OF THE BAR)

v.)

DECISION AND ORDER)

TERRANCE J. BRENNAN)
of Portland, Maine)

This matter is before the Court pursuant to M. Bar R. 7.2(b)(1) and 7.2(b)(2) on an Information dated April 28, 1995, and filed by Bar Counsel J. Scott Davis on behalf of the Board of Overseers of the Bar against Terrance J. Brennan, an attorney practicing law in Portland. The Board is seeking Brennan's suspension or disbarment. On March 20, 1995, with a petition pending before the Grievance Commission and a hearing set for later that afternoon, Brennan waived the procedure set forth in M. Bar R. 7.1(e) and agreed to proceed directly to this Court by Information as described in M. Bar R. 7.2(b)(1). The Information was duly served on Brennan on May 1, 1995. Brennan has failed to file an answer within the required time, therefore the allegations in the Information are taken as admitted. Pursuant to the Court's order to show cause Brennan appeared in Court on September 21, 1995, conceded the facts set forth in the Information, admitted that he is an alcoholic, and attributed his conduct to his alcoholism.

FINDINGS

1. Terrance J. Brennan is an alcoholic and has had a problem with alcohol during his entire adult life.

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2. In 1980 or 1981 he stopped drinking and refrained from the consumption of any alcohol for nine or ten years.

3. In 1986 he became an Assistant Attorney General with primary responsibility for the representation of the Department of Corrections.

4. Brennan started drinking again and by the fall of 1991 his alcohol abuse had become such a serious problem that he was unable, in many cases, to do his job.

5. In late October of 1992 the United States District Court instructed Brennan to bring to the attention of his superiors his failure to file certain pretrial documents in a pending federal lawsuit. At that time he acknowledged to the Court and his superiors that he had a substance abuse problem. He was asked to prepare a report on the status of his pending cases and to identify any cases in which problems existed. Brennan prepared such a report, dated November 3, 1992, but failed to identify any problem in two of his pending cases: Maynard v. Wyse and Orsini v. Allen.

Maynard v. Wyse

6. In January of 1991 this wrongful death case, involving an escapee of the Maine Youth Center who was murdered, was assigned to Brennan by his superiors in the Attorney General's office

7. Due to a failure to provide discovery, Brennan's clients, the State of Maine, and several individual employees of the State were defaulted in a default judgment dated October 1, 1992.

8. Following the default judgment, Brennan lied about the status of the case and affirmatively concealed the status from his superiors and from

his individual clients, the Superintendent of the Maine Youth Center, and the Commissioner of the Maine Department of Corrections.

9. Because of the default judgment the State of Maine was exposed to substantial liability in spite of the existence of sovereign immunity and the absence of any insurance and the individual defendants were exposed to personal liability despite having absolute and qualified immunities under the Maine Tort Claim Act and federal § 1983 precedents.

10. After Brennan left the Attorney General's office, through the efforts of successor counsel the default judgment was lifted by order of the Superior Court on November 23, 1993.

Orsini v. Allen

11. In October of 1991 this case, involving an assault by a fellow prisoner and a charge of inadequate supervision, was assigned to Brennan by his superiors in the Attorney General's office.

12. In his November 1992 report on pending cases, Brennan made no mention of the fact that a motion to compel discovery had been filed by the plaintiffs.

13. Due to Brennan's failure to provide discovery, on January 13, 1993, an order was entered in this case for judgment against his clients on the issue of liability.

14. Brennan failed to disclose the January 13 judgment to either his superiors or his individual clients and thereafter he affirmatively lied to his superiors as to the status of the case.

15. Because of the judgment the State of Maine was exposed to

liability in spite of the existence of sovereign immunity and the absence of any insurance and the individual defendants were exposed to personal liability despite having absolute and qualified immunities under the Maine Tort Claim Act as well as § 1983 precedents.

16. Given the fact that Orsini was not hospitalized following the assault and has since been shot to death by an Augusta police officer, damages in the case are not expected to be significant.

17. In any event, after Brennan left the Attorney General's office, through the efforts of successor counsel the order of default was vacated on November 23, 1994.

Private Practice

18. In the summer of 1993, due to a reduction in force, Brennan lost his job at the Attorney General's office.

19. In August 1993 Brennan opened a private practice in Portland.

20. In his February 4, 1994, letter to the Board of Overseers of the Bar Brennan claimed to have been alcohol free for approximately one and one-half years or since roughly August of 1992.

Bragdon

21. In May 1994 Brennan received a \$3,000 retainer to bring an action on behalf of Darryl W. Bragdon's brother who was then an inmate in the Maine State prison. Thereafter for several weeks Brennan neglected this matter and refused to return phone calls or respond to letters of inquiry. In late June he was asked to return the retainer. On July 25, 1994, not having heard from Brennan or received the retainer, Darryl Bragdon

complained to the Board of Overseers of the Bar.

22. Brennan failed to respond to Bar Counsel's letters of August 8 with regard to this matter and thereafter a Fee Arbitration Commission Panel found that Brennan had performed no services and should immediately return the \$3,000 retainer.

Bradford

23. On February 4, 1994, Brennan was retained to represent Wayne Bradford in a divorce action brought by Bradford's wife. Brennan failed to answer the complaint or take any other action and, as a result, Bradford was defaulted. Because Brennan took no steps to mitigate the situation, Bradford proceeded pro se to do so himself and then reported Brennan to the Board of Overseers of the Bar on August 26, 1994.

24. On October 5, 1994, Brennan was asked to respond to the Bradford complaint by October 27, 1994, but failed to do so.

25. These facts demonstrate a pattern of neglect and deceit and establish that Brennan has violated M. Bar R. 2(c), 3.1(a), 3.5(a)(2), 3.5(a)(3), 3.6(a)(2), and 3.6(a)(3).

SANCTION

The American Bar Association Model Standards for Imposing Lawyer Sanctions require the Court to consider four factors:

- (1) What ethical duty did the lawyer breach/violate? (A duty to client, the public, the legal system, or the profession?)
- (2) What was the lawyer's mental state at the time of his/her breach of duty? (Did the lawyer act intentionally, knowingly, or negligently?)
- (3) What was the extent of the actual or potential injury caused by the lawyer's misconduct?

(4) Are there any aggravating or mitigating circumstances?

Laws. Man. on Prof. Conduct (ABA/BNA), Model Standards for Imposing Lawyer Sanctions at 01:815, Model Standard 3.0 (1986) (amended 1992). The most important ethical duties a lawyer must uphold are those obligations owed to a client. Id. at 01:805. These duties include the duty of diligence violated by Brennan in this case. Intentional misconduct is the most culpable act. Id. Negligent conduct is the least culpable. Id. Brennan's conduct reflects both negligence resulting from his alcoholism and intentional deceit designed to cover his negligence.

According to the American Bar Association's Model Standards for Imposing Lawyer Sanctions, disbarment is generally appropriate when a lawyer:

1. "knowingly converts client property and causes injury or potential injury to a client." (§ 4.11)
2. "abandons the practice and causes serious or potentially serious injury to a client." (§ 4.41(a))
3. "knowingly fails to perform services for a client and causes serious or potentially serious injury to a client." (§ 4.41(b))
4. "engages in a pattern of neglect with respect to client matters and causes serious or potentially serious injury to a client." (§ 4.41(c))
5. "knowingly deceives a client with the intent to benefit the lawyer or another, and causes serious injury or potentially serious injury to a client." (§ 4.61)

The Standards define "potential injury" as the "harm to a client . . .

that is reasonably foreseeable at the time of the lawyer's misconduct, and which, but for some intervening factor or event, would probably have resulted from the lawyer's misconduct." The ABA Standards provide no help in distinguishing between "injury" and "serious injury" except to indicate that the "level of injury can range from serious injury to little or no injury. . . ."

The Court is not satisfied that Brennan "knowingly converted" Darryl W. Bragdon's money or that he "abandoned his practice." The Court is satisfied that Brennan's conduct caused "potentially serious injury" to the State of Maine and the Superintendent of the Maine Youth Center and the Commissioner of the Maine Department of Corrections (Maynard v. Wyse) and Wayne Bradford (Bradford) and that Brennan "knowingly failed to perform services for a client" and "engaged in a pattern of neglect with respect to client matters" and "knowingly deceived a client with the intent to benefit" himself.

The Model Standards also identify aggravating and mitigating circumstances that the Court can consider in deciding on an appropriate sanction. Aggravating factors relevant to this case include a pattern of misconduct, multiple offenses, and Brennan's failure to respond in a timely manner to inquiries from Bar Counsel about complaints and submission of a false statement during the disciplinary process concerning his sobriety between August 1992 and February 1994. Model Standard 9.2.

Mitigating factors relevant to this case include the absence of a prior disciplinary record, absence of a dishonest or selfish motive (at least with

respect to his failure to perform) and remorse. Model Standard 9.3.

In making its decision on sanctions, the Court must also consider the purpose of lawyer discipline. As the Model Standards state in a commentary:

As identified by the courts, the primary purpose is to protect the public. Second, the courts cite the need to protect the integrity of the legal system, and to insure the administration of justice. Another purpose is to deter further unethical conduct and, where appropriate, to rehabilitate the lawyer. A final purpose of imposing sanctions is to educate other lawyers and the public, thereby deterring unethical behavior among all members of the profession. As the courts have noted, while sanctions imposed on a lawyer obviously have a punitive aspect, nonetheless, it is not the purpose to impose such sanctions for punishment.

Id. commentary to Model Standard 1.1 (footnotes omitted). In terms of protecting the public, any sanction that removes Brennan from the practice of law serves that purpose. This purpose of the sanction offers no basis for choosing suspending him from practice for a definite period, or disbaring him. Similarly, a reasoned explanation of a sanction in a written decision, whatever the specifics of the sanction, serves the purpose of education. That purpose also offers no basis for choosing among sanctions.

Deterrence as a basis for choice of sanction is also problematic. All of the sanctions mentioned are equally effective in depriving a lawyer of his or her livelihood. All involve public exposure of a lawyer's shortcomings. In these senses, the process of lawyer discipline serves an important deterrent purpose independently of the specific sanction imposed.

In the Court's view, the choice of sanction is most directly tied to the administration of justice, which in turn depends so heavily on public

confidence in the system of justice. Although the purpose of the disciplinary sanction is not punishment, the lawyer experiences the sanction as punishment, and the public perceives it as punishment. Because of that perception, the sanction imposed is viewed by the public as a measure of official condemnation, with disbarment recognized as the strongest statement of censure. If the public perceives that the sanction is not commensurate with the severity of the misconduct, public confidence in the system of justice will be eroded. Recognizing the importance of this consideration, and taking into consideration all of the findings and factors discussed previously, the Court concludes that Brennan's conduct merits disbarment.

ORDER

Based on the foregoing, it is HEREBY ORDERED that Terrance J. Brennan is disbarred from the practice of law in the State of Maine effective from the date of this order, with Brennan being authorized to petition for reinstatement in accordance with M. Bar R. 7.3(j) after one year from this date; and it is further ORDERED that should Brennan seek reinstatement in accordance with M. Bar R. 7.3(j), he must do so with the following conditions in addition to those otherwise set forth and applicable within that rule:

a. Provide reliable and credible proof that he has obtained appropriate counselling and treatment for the alcoholism problem with which he suffers, therein specifically addressing and meeting the requirements of M. Bar R. 7.3(j)(3)(A)(i)-(iv);

b. Provide proof that a competent alcoholism counsellor has determined that he has addressed his alcoholism and that the problem no longer poses a threat to the interests of the public and any clients that Brennan may serve;

c. Provide proof certifying that during the period of his disbarment he has regularly attended meetings of Alcoholics Anonymous (AA), and shall make his sponsor or other contact person at AA available to testify concerning any petition for reinstatement;

d. Submit a plan by which he proposes to practice law in a manner that will minimize the possibility that the problems that resulted in his disbarment from the practice of law will reoccur. That plan shall include, but not be limited to, the establishment of a mentor relationship with a member of the Maine bar with at least ten years of experience with whom Brennan will consult on a regular basis for a period of at least two years. That mentor shall certify in writing that he/she agrees to serve in that capacity, and that he/she will supply the Court and Bar Counsel with quarterly status reports regarding Brennan's practice and his progress in addressing the problems that resulted in his disbarment;

e. Include within any reinstatement petition an affidavit confirming that he has remitted a full refund in the amount of \$3,000.00, with interest, computed in accordance with Title 14 M.R.S.A. § 1602 since that Fee Arbitration Commission's judgment date of October 17, 1994, to Darryl W. Bragdon, 8263 W. Quarto Avenue, Littleton, Colorado 80123; and

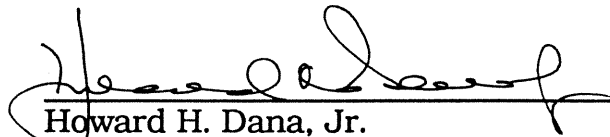
f. Immediately inform Bar Counsel of any change of his current

residence or telephone number that occurs during the disbarment period.

It is FURTHER ORDERED that Brennan shall comply with M. Bar R. 7.3(i)(1) within fifteen days of this order, therein certifying to the Court and Bar Counsel his appropriate notification of any present clients and courts of his disbarment, or the effective date that he earlier ceased complete practice and representation of any clients.

Dated: December 26, 1995

For the Court,

A handwritten signature in black ink, appearing to read "Howard H. Dana, Jr.", is written over a horizontal line.

Howard H. Dana, Jr.
Associate Justice
Supreme Judicial Court

